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June 30, 2011

The Honorable Darrell V. McGraw, Jr.
Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305

Dear Attorney General McGraw:

In a decision styled *Arizona Free Enterprise Club's Freedom Club Pac v. Bennett, Secretary of State of Arizona, et al*, June 27, 2011, the United States Supreme Court found some parts of the Arizona Public Campaign Financing law to be an unconstitutional restriction of free speech.

In 2010, HB 4130 (effective June 10, 2010), "The West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program", created a plan for optional public financing of the two seats on the West Virginia Supreme Court of Appeals that are scheduled for nomination and election in 2012. The West Virginia law shares some similarities with that part of the Arizona law that has been struck down (WV Code §§3-12-11(f)-(i)).

Candidates who are considering seeking public financing are currently planning and organizing their drives to obtain the contributions necessary to qualify for receipt of public financing funds. Receipt of those contributions may begin on September 1, 2011. Required amounts and numbers of contributions must be raised no later than January 28, 2012. In order to determine whether to proceed, candidates may need to know whether the "matching funds", the Arizona equivalent of which has been struck down, will be available to their campaigns.

The West Virginia Secretary of State is required by the public financing law to inform participating and non participating candidates, potential candidates of both

types, persons contemplating making independent expenditures in the Supreme Court nomination and election, and the general public, of the provisions, procedures and processes of the law. The West Virginia Secretary of State cannot offer a meaningful explanation without first determining whether the "matching funds" are constitutional.

The State Election Commission has the statutory duty to administer the public financing funds and to cause the matching funds checks to be issued. The State Election Commission has an obvious interest in the question presented by the United States Supreme Court decision. In a duly-noticed public meeting conducted June 30, 2011, the State Election Commission approved the Secretary of State's proposal to ask for a formal opinion and authorized the Secretary of State to state that the State Election Commission joins in her request.

Leaving the constitutional question unanswered may result in some qualified candidate(s) deciding to not run for the office; to the detriment of our citizens. If there is any question about the constitutional validity of the West Virginia matching fund system, the Legislative and Executive Branches may wish to amend the code to provide constitutional protections to candidates and other persons wishing to express their privileged free speech. Such amendment would necessarily require the calling of a special session, and likely must be passed prior to September 1, 2011.

Facing these legal obligations and pressing time constraints, I formally request that you provide your professional legal opinion on the question:

1. Is the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program constitutional in light of the recent United States Supreme Court ruling on the Arizona law?

Therefore, pursuant to the provisions of section one, article three, chapter five of the West Virginia Code, I respectfully request your written opinion on this question of law.

Sincerely,



Natalie E. Tennant
Secretary of State

cc: The Honorable Earl Ray Tomblin
The Honorable Rick Thompson
The Honorable Jeff Kessler

The Honorable Tim Miley
The Honorable Corey Palumbo
Members State Election Commission